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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

RULES PURSUANT TO 39 U.S.C. § 404a	Docket No. RM2013-4

REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE
(August 28, 2013)

In Order No. 1739 (June 5, 2013), the Postal Regulatory Commission (Commission) initiated this docket to "propos[e] rules to govern complaints alleging violations of 39 U.S.C. § 404a."[1] The Order sets today as the deadline for interested parties to provide reply comments.[2] The United States Postal Service (Postal Service) hereby submits its Reply Comments.

Introduction

The Postal Service outlined a number of serious concerns with the proposed accelerated procedures for section 404a complaints in its Initial Comments. In reviewing the Initial Comments from the other participants in this docket, including a number of additional proposals that are addressed in detail below, the Postal Service is increasingly concerned with the potential for this docket to result in unjustified and inefficient litigation procedures that unfairly favor the complainant. Furthermore, a number of participants raise issues that indicate a misunderstanding of federal antitrust law and the scope of section 404a. As such, the Postal Service urges the Commission to withdraw its proposed rules, and instead maintain the existing rules, which allow the

[1] Order No. 1739, Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. § 404a, PRC Docket No. RM 2013-4 (June 5, 2013), at 1.

[2] *Id.* at 23.

Commission to address its concerns regarding section 404a complaints on a case by case basis. If the Commission does proceed with this rulemaking, it must address the numerous concerns raised by participants in the initial round of comments. Below, the Postal Service offers its concerns and recommendations regarding these comments.

I. PARTICIPANTS' COMMENTS OFFER PROPOSALS THAT WILL ENCOURAGE AND FACILITATE UNJUSTIFIED COMPLAINTS, AND THAT WILL LEAD TO INEFFICIENCY AND A WASTE OF RESOURCES.

A. There Is No Basis for Establishing *Per Se* Violations of 39 U.S.C. § 404a(a)(1).

Pitney Bowes Inc. (Pitney Bowes) proposes that the Commission establish *per se* violations of section 404a. This position is not supported by the treatment of *per se* violations under federal antitrust law, and should be rejected by the Commission. Because there is a general trend away from *per se* analysis in the antitrust law context, and because the Commission's experience with section 404a violations is insufficient to identify *per se* violations of section 404a,[3] it would be inappropriate to establish *per se* violations of section 404a.

The accepted standard for testing whether a practice restrains trade is the rule of reason, which requires the fact finder to weigh "all of the circumstances,"[4] including "specific information about the relevant business" and "the restraint's history, nature, and effect."[5] In the past, courts have also identified *per se* violations of federal antitrust law based on their experiences with specific categories of conduct that always or almost

[3] Comments of Time Inc. in Response to Order No. 1739 (hereinafter "Time Comments"), PRC Docket No. RM2013-4 (July 29, 2013) at 9. *GameFly*, the one complaint case that the Commission cites as "rais[ing] issues relating to unfair competition," Order No. 1739 at 10, was not an unfair competition case, but a case concerning purportedly discriminatory Postal Service mail processing practices. *See* Frederick Foster's Opinion on the PRC Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a, PRC Docket No. RM2013-4 (July 19, 2013).

[4] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

[5] *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

always had anticompetitive effects.[6] Such *per se* conduct is presumed to violate the antitrust laws, and the analysis of this type of conduct does not require a weighing of the procompetitive benefits and anticompetitive effects.[7]

In recent years, the Supreme Court has turned sharply away from establishing *per se* violations, and has narrowed the established *per se* categories. Specifically, the Court has stated that "departure from the rule of reason must be based upon demonstrable economic effect rather than . . . formalistic line drawing."[8] Courts have eliminated or curtailed a number of previously established categories where *per se* rules were strictly applied, including vertical, intrabrand, non-price restraints,[9] vertical price restraints,[10] intrabrand maximum price restraints,[11] tying,[12] and exclusive dealing.[13] In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the most recent of these instances, the Supreme Court stated that "a *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue . . . and only if they can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason."[14] The Commission does not have such

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[6] *Broadcast Music, Inc. v. Columbia Broad. Sys*., 441 U.S. 1, 19-20 (1979); *Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211 (1898); *see also* Adam Weg, *Per Se Treatment: An Unnecessary Relic of Antitrust Litigation*, 60 HASTINGS SCI. & TECH. L.J. 1535, 1537-38 (2009) (outlining a general history of the development of *per se* treatment by the Supreme Court).

[7] *See* Order No. 1739 at 7.

[8] *Continental T.V., Inc.*, 433 U.S. at 58-59; *see also* Weg, 60 HASTINGS SCI. & TECH. L.J. at 1538 (citing *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877 (2007)) ("Since 1977, however, the Court has whittled away at the categories of agreements that receive per se treatment.").

[9] *See Continental T.V., Inc.*, 433 U.S. at 58-59.

[10] *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877 (2007).

[11] *Broadcast Music,* 441 U.S. 1.

[12] *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992).

[13] *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 597 (1st Cir. 1993) (requiring plaintiff to show "probable immediate and future effects").

[14] *Leegin*, 551 U.S. at 878.

considerable experience, given the lack of section 404a cases to date. The adoption of rules establishing new categories of *per se* violations would be inconsistent with a decades-long line of Supreme Court precedent that has slowly rolled back such categories as better economic evidence becomes available.

Pitney Bowes contends that "[t]he proposed rules implementing section 404a(a)(1) could . . . be improved by including additional guidance on actions that would be deemed *per se* violations."[15] As an example, Pitney Bowes suggests that "the rules should state that it is a *per se* violation for the Postal Service to offer a 'free' product or service in an established market absent a showing that the product can be offered at zero marginal cost."[16] Pitney Bowes' example is inapt, however, because under federal antitrust law, *per se* analysis does not apply to allegations of pricing below cost.[17] Moreover, below-cost pricing does not, by itself, amount to predatory pricing. It is well-established that a predatory pricing claim requires proof of a second element, the reasonable likelihood of recouping the losses through future price increases.[18] Courts' unwillingness to penalize below-cost pricing *per se* reflects the view that below-cost pricing can, in some cases, produce procompetitive benefits and enhance consumer welfare.[19] Below-cost pricing offers one example of the dangers and inefficiencies that

[15] Comments of Pitney Bowes Inc. (hereinafter "Pitney Bowes Comments"), PRC Docket No. RM2013-4 (July 29, 2013) at 5.

[16] *Id.*

[17] *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 210, 230 (1993).

[18] *Id.* at 224 ("The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. For the investment to be rational, the predator must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." (internal citations and quotations omitted)).

[19] *Id.* ("Without [recoupment], predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient

can result from application of *per se* analysis without extensive experience and support, and it provides further justification for why the Commission should reject Pitney Bowes proposal for *per se* violations of section 404a.

B. The Requirement that a Party Show Actual Harm Ensures That It Has an Interest in the Complaint Proceedings and That the Complaint Raises an Actual Case or Controversy for Purposes of Establishing Standing, and Acts as a Filter to Avoid Waste of Resources on Unjustified Complaints.

The Public Representative opposes the jurisdictional threshold proffered in the proposed rules at sections 3032.5(a)(2), 3032.6(a), and 3032.7(a), which would require that a complainant show that he or she was harmed by the conduct in question.[20] United Parcel Service (UPS) is similarly opposed to this requirement.[21] The Commission has broad authority to interpret statutes that proscribe which parties may file suit and under what conditions, and may establish rules necessary to ensure effective administration of claims.[22] This threshold requirement of harm, however, is a reasonable interpretation of the underlying statute here and would be consistent with the fair constitutional standing requirement applied in federal courts; namely, that a plaintiff must show injury or the imminent threat thereof in order to bring a viable complaint.[23] The Postal Service agrees with the Commission's proposal to establish

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substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.").

[20] Public Representative Comments, PRC Docket No. RM2013-4 (July 29, 2013), at 16. Despite opposing a threshold standing requirement, the Public Representative does explain that such a requirement "will preclude complaints from persons who have no tangible interest in the outcome of the proceedings."

[21] Initial Comments of United Parcel Service In Response to Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. § 404a (hereinafter "UPS Initial Comments"), PRC Docket No. RM2013-4 (July 29, 2013) at 5-9.

[22] *Envirocare of Utah v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

[23] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

simple and effective requirements for demonstration of harm in order to reduce frivolous complaints and ensure fair treatment of parties, much as Article III courts do with the application of standing requirements.

Section 404a(c) allows "[a]ny party . . . who believes that the Postal Service has violated this section [to] bring a complaint in accordance with section 3662." However, Section 3662(a) limits the definition of "any party" by requiring that the complainant must be "[a]ny interested person." An "interested" party, for purposes of an administrative hearing is a vague notion. Courts have recognized that this term means one who has a legally recognized private interest[24] and not simply a possible pecuniary benefit.[25] Under that standard, a party would not be able to bring a complaint if it could only show hypothetical harms brought about by the actions of the Postal Service, even if that party would incidentally profit in some way. This interpretation ensures that challenges are limited to situations in which there is a true controversy with something at stake for the complainant, similar to the constitutional requirement for standing. Interpretation of the term "interested party" is dependent on the specific statute where it appears, and the Commission here has broad authority, subject to *Chevron* deference, to interpret the requirements imposed by section 3662.[26] The Commission cannot consider section 404a in isolation; it must be read in conjunction with the requirements for an interested party established in section 3662, which is most reasonably defined as a party with a legally recognized private interest, and that definition strongly implies that some sort of harm to the party is necessary.

[24] *Local 282, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am. v. NLRB*, 339 F.2d 795 (2d Cir. 1964).

[25] *United States ex rel. Smith v. Russell*, 359 F.2d 795 (3d Cir. 1966).

[26] *Envirocare of Utah v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

Additionally, the Commission's proposed standing requirement is the only possibility consistent with section 404a(1), which forbids the Postal Service to "establish any rule or regulation (including any standard) **the effect of which** is to preclude competition or establish the terms of competition." (emphasis added). If the Commission were to adopt a loose requirement for filing where a party was not required to show any effects of the challenged action, a party would still face the burden of showing that the actions of the Postal Service had some effect on competition. It would be illogical for the Commission to allow resources to be expended arguing cases in situations where the petitioner would be unable to meet a core requirement of the enabling statute.

Finally, the Commission's proposal to require some showing of harm to the party would greatly increase the efficiency of proceedings by weeding out frivolous complaints by unaffected parties. The establishment of a harm requirement is the only rational interpretation of section 3662 that would be consistent with the ultimate purpose of this rulemaking: to increase the efficiency and speed of the Commission's section 404a complaint procedures while maintaining fairness. Otherwise, the valuable resources of the Postal Service and the Commission, as well as the complainant, could be wasted in pursuit of claims where no party has suffered, nor ever would suffer, any harm. There are a number of checks and balances, such as the required filings of policy changes for Commission review, to ensure that the Postal Service's actions do not impact the free market. To do away with this threshold requirement for a complaint would be wasteful and would defeat the purposes of establishing this expedited type of proceeding.

C. The Acceptance of Anonymous Complaints Would Interfere With the Postal Service's Ability to Respond to the Complaint.

Stamps.com and Endicia propose a rule that would allow complainants to file anonymously.[27] Such a rule would be an extreme, unwarranted, and unprecedented step. The Postal Service is unable to find any similar situation in which administrative agencies allow private parties to file claims under seal against a government agency. To propose such a rule, with only one unfounded and spurious example as support, is certainly extraordinary and would have serious negative consequences for the resolution of such claims.

Allowing parties to file anonymously would incapacitate the Postal Service's ability to raise effective defenses. For example, under section 404a(a)(1), the Postal Service may not "establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service." Without the ability to identify the party that claims to be affected, the Postal Service would be unable to effectively show that no competitive advantage has been created for itself or for another entity. If the anonymous complainant were to claim that information gathered under the Postal Service's regulatory powers was used to take business in violation of section 404a(a)(3), then the Postal Service would be unable to assert affirmatively that the information was obtained from an independent source or is

[27] Joint Comments of Stamps.com and Endicia (hereinafter "Stamps.com and Endicia Comments"), PRC Docket No. RM2013-4 (July 29, 2013), at 2-3 (requesting that the rules allow complainants to file actions under seal).

otherwise obtained, as the statute allows. It would further hinder the Postal Service's ability to conduct its own internal factfinding and gather evidence relevant to the case.

If a party is somehow able to prove that it has suffered discrimination or otherwise unfair treatment as a result of its complaint, then the Commission can take that into account when crafting a final remedy. The only purpose that could be served by allowing parties to bring complaints anonymously would be to handicap the Postal Service's ability to defend itself in such a case in the first place, especially within the expedited timeframe proposed by the Commission.

Finally, Stamps.com and Endicia's joint proposal to allow complaints to be filed under seal is based entirely on an unsupported misrepresentation of the Postal Service's treatment of GameFly after GameFly filed a complaint in PRC Docket No. C2009-1. As justification for this proposed rule, Stamps.com and Endicia contend that "even the public identification of the complainant could have far-ranging negative consequences," but cite retaliation by the Postal Service as the only example of "negative consequences."[28] Without any support or further explanation, Stamps.com and Endicia then allege that "when Gamefly, Inc. brought a complaint in Docket No. C2009-1, the Postal Service instructed all postal employees, including local field level personnel at mail processing facilities, to cease all direct communications with Gamefly."[29] This serious allegation of severe misconduct is inaccurate and unfounded.

After GameFly filed its complaint in PRC Docket No. C2009-1, the Postal Service applied the same customer service policies to GameFly as to other customers and did not treat GameFly differently because of the existence of the complaint. Dealing with

[28] Stamps.com and Endicia Comments at 2-3.

[29] *Id.* at 3.

customer complaints and litigation is a part of conducting business, and the Postal Service benefits from maintenance of the customer relationship with the parties that file complaints and engage in litigation. With respect to GameFly, because of general concerns about ensuring use of proper discovery channels during the course of litigation, the Postal Service and GameFly agreed that GameFly would submit all requests for meetings with the Postal Service through its attorney. Most, if not all, of GameFly's requests were granted, and during the period after it filed the complaint, GameFly met with Postal Service representatives as often as, if not more often than, before it filed the complaint.

In summary, there is no justification or need for allowing claims to be filed anonymously, and such a move would be highly exceptional and questionable. Assertions that the Postal Service has retaliated against claimants in the past are completely unfounded. The only effect of such a rule would be to hinder the Postal Service's ability to adequately refute the claim.

D. Omission of the Rule Prohibiting Assertions Based on Information and Belief Would Encourage Speculative Complaints with No Factual Basis.

The Public Representative opposes the prohibition on assertions "based on information and belief" in pleadings proffered in proposed rule 3033.10.[30] This prohibition, however, is consistent with pleading requirements currently enforced in federal courts. Further, the Public Representative's concerns are unfounded.

Federal courts are increasingly requiring more specific factual allegations when determining whether a pleading should be dismissed for failing to state a claim upon

[30] Public Representative Comments at 19-20.

which relief can be granted.[31] The Supreme Court made clear in *Bell Atlantic Corp. v. Twombly*, [32] and *Ashcroft v. Iqbal*[33] that the heightened pleading standard requires that a pleading must contain more than "naked assertions devoid of further factual enhancement," but rather, a pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." [34]

The heightened pleading standard employed by federal courts is intended to achieve the practical goal of avoiding unnecessary and costly discovery.[35] The proposed prohibition on allegations based on "information and belief" will similarly discourage speculative complaints before the Commission and therefore preserve resources. In fact, the Public Representative admits that "this rule will have the laudable effect of forcing the parties to stick to the facts in accelerated proceedings."[36]

The Public Representative opposes the prohibition because the rule may "operate a bit harshly."[37] This concern is unfounded for two reasons. First, the proposed rule still permits assertions based on information and belief when "accompanied by affidavit(s) or declaration(s) explaining the basis for the belief and why the facts could not be reasonably ascertained."[38] Second, if a complainant is unable to

[31] FED. R. CIV. P. 12(b)(6).

[32] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

[33] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (applying *Twombly* in a non-antitrust context).

[34] *Id.* at 678 (citing *Twombly*, 550 U.S. at 557).

[35] *See, e.g.*, *Twombly*, 550 U.S. at 558 (noting that "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive" (internal citations omitted)). *Twombly* is particularly informative as it involved allegations of an antitrust conspiracy in violation of the Sherman Act.

[36] Public Representative Comments at 19-20.

[37] *Id.* at 20.

[38] Order No. 1739 at 35.

meet the pleading requirement for an accelerated complaint, then he or she can opt to file a complaint under the ordinary complaint procedures.

As with federal court cases, a heightened pleading standard in the accelerated complaint cases will increase the likelihood that litigants have factual support for their claims prior to expending Commission and participant resources. If the Commission proceeds with this rulemaking, it should maintain proposed rule 3033.10 which prohibits assertions "based on information and belief" in pleadings.

E. Extension of the Proposed Expedited Procedures to All Complaints Is Beyond the Scope of the Rulemaking, Would Magnify the Unfairness Issues Raised in the Postal Service's Initial Comments and Would Heighten the Risk of Unsupported Complaint Remedies with Adverse Consequences for the Postal Service and Participants Other than the Complainant.

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (Valpak) assert that the Commission should consider extending the expedited procedures to all complaint cases, rather than just section 404a complaint cases.[39] This proposal is well beyond the scope of the Commission's rulemaking and is inappropriate for consideration in this docket.[40] This is particularly true given that the Commission conducted a comprehensive rulemaking with respect to section 3662 complaints in Docket No. RM2008-3, which gave thoughtful and holistic consideration to the complaint

[39] Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Initial Comments on Notice of Proposed Rulemaking (hereinafter "Valpak Initial Comments"), PRC Docket No. RM2013-4 (July 29, 2013), at 2.

[40] The Public Representative asserts that the Commission should develop procedural rules to apply equally to all complaints brought pursuant to section 3662. Public Representative Comments at 13-15. In doing so, however, the Public Representative makes clear that if the Commission was to consider such procedural changes, it would have to do so in a holistic manner to include all complaint cases, and that this docket is not the proper docket for making such changes. *Id.* at 15 ("While supportive of the Commission's efforts to accelerate section 404a proceedings, the Public Representative believes that this is not the docket in which to make these changes. Rules of procedure, by their nature, must cover a number of topics[.]").

rules.[41] The Postal Service is unaware of any developments since that rulemaking that justify a wholesale revisiting of the rules reached in that docket, and Valpak has provided no such justification. Moreover, extension of the expedited procedures to all complaint cases would require a new notice of proposed rulemaking to be consistent with the requirements of the Administrative Procedure Act (APA).[42]

In addition to being beyond the scope of this docket, Valpak's proposal is also ill-advised given the concerns that the Postal Service has outlined in its Initial Comments and these Reply Comments. A number of other participants raise additional concerns regarding the proposed procedures. For example, Time opposes the Commission's proposed accelerated procedures for section 404a complaints because they unfairly benefit complainants and disadvantage the Postal Service and other parties, encourage frivolous lawsuits, and seek to remedy a nonexistent problem.[43] Similarly, Valassis Direct Mail, Inc. (Valassis) opposes the Commission's proposed rules because they "will likely severely impair the due process rights of the respondent Postal Service and other parties who oppose the complaint, denying them the opportunity through discovery and hearing to test the validity and probative value of the facts and allegations presented in

[41] *See generally* PRC Docket No. RM 2008-3, Rules for Complaints.

[42] *See generally* 5 U.S.C. § 552; *see also* 39 U.S.C. § 503 (applying chapter 5 U.S.C. Chapter 5 to the Commission's promulgation of rules and regulations and establishment of procedures).

[43] *See, e.g.*, Time Comments at 3 ("To achieve the dramatic acceleration sought by the NOPR, the proposed procedures have become heavily tilted in favor of complainants."); *id.* at 6 ("The Commission's proposal therefore poses a gratuitous threat of financial harm to a Postal Service that is already struggling to avert fiscal collapse. It also poses a particular threat to any segments of the mailing, publishing, and advertising industries which may have been among the beneficiaries of allegedly 'anticompetitive' Postal Service pricing policies (whether these policies be manifested through alleged 'subsidies' to 'underwater' products, or through 'excessively' high, or low, passthroughs of workshare cost savings, or 'excessively' favorable terms in Negotiated Service Agreements, or even through differences in relative markups over cost which a potential complainant may believe to be unfair or imprudent)."); *id.* at 17.

the complaint," and because they are particularly inappropriate for section 404a complaints, which involve complex issues.[44]

These concerns highlight the problematic nature of the Commission's proposed accelerated complaint procedures, and would only be exacerbated if the expedited procedures were extended to all complaints, rather than just the limited universe of complaints brought pursuant to section 404a.

F. Permitting Depositions per Proposed Rule 3032.15 Will Lead to Inefficient and Burdensome Discovery.

The Public Representative supports the allowance of depositions in section 404a complaint cases, asserting that depositions may lead to more efficient proceedings.[45] As the Public Representative acknowledges, however, the use of Federal Rule of Civil Procedure 30 for depositions conducted pursuant to proposed rule 3032.15 "will prove burdensome in practice."[46] The Public Representative highlights a number of concerns with the efficiency of oral depositions and, while supporting their use, provides insufficient guidance on how depositions can be conducted in an efficient manner. This is because, as GrayHair Software Inc. explained, "the routine availability of depositions

[44] Valassis Direct Mail, Inc. (hereinafter "Valassis Initial Comments"), PRC Docket No. RM2013-4 (July 29, 2013), at 2-3.

[45] Public Representative Comments at 12, 17. IDEAlliance, Pitney Bowes, and UPS express support for proposed rule 3032.15. *See* Initial Comments of the International Digital Enterprise Alliance, Inc. (IDEAlliance) (hereinafter "IDEAlliance Initial Comments"), PRC Docket No. RM2013-4 (July 29, 2013), at 1; Pitney Bowes Comments at 6-7; UPS Initial Comments at 1-2. Stamps.com and Endicia support the use of depositions in both ordinary and accelerated section 404a Complaint cases. Stamps.com and Endicia Comments at 6-7. For the reasons discussed in the Postal Service's Initial Comments, and expanded on here, the extension of depositions to accelerated cases is ill-advised.

[46] Public Representative Comments at 17.

creates a significant potential for harassment" by parties that may overuse depositions or conduct the depositions in an inefficient manner.[47]

As the Postal Service outlined in its Initial Comments, the fact that a deposition itself may provide an immediate response to a question ignores the lack of efficiency associated with the practices and procedures leading up to the deposition and following the deposition.[48] This is because witness preparation for depositions is costly and less efficient than written discovery, as the scope of a deposition is much broader. Further, the efficiency of the immediate response and follow-up allowed during a deposition does not consider the practical realities of a deposition, where witnesses are not always willing or able to answer a question completely and attorneys are quick to object. Finally, the follow-up from a deposition may include motions practice regarding objections made during the deposition. These issues, as well as the actual cost of the deposition (including the cost of a transcriber, space rental if applicable, and attorney and witness work hours), are largely avoidable through the current procedures for written and oral cross-examination. As such, the Commission should not permit depositions in the ordinary course of section 404a complaint cases.

G. Elimination of Proposed Rule 3033.9(b) Would Make It More Difficult to Dismiss Unjustified Complaints, and Increase the Resources Necessary to Litigate Unjustified Complaints.

The Public Representative opposes proposed rule 3033.9(b), which provides that "[f]ailure to reply to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts supporting such affirmative defense that are not

[47] Comments of GrayHair Software Inc. (hereinafter "GrayHair Comments"), PRC Docket No. RM2013-4 (July 29, 2013) at 14.

[48] Initial Comments of the United States Postal Service (hereinafter "USPS Initial Comments"), PRC Docket No. RM2013-4 (July 29, 2013), at 16-19.

specifically contradicted in the complaint."[49] This proposed rule, however, would help streamline the pleadings process and preserve Commission and participant resources.

Proposed rule 3033.9 allows "[r]eplies to answers raising affirmative defenses" presumably to provide the Commission a mechanism to accommodate affirmative defenses as part of an accelerated schedule.[50] The Public Representative, however, only appears to oppose the portion of the proposed rule that requires a complainant to reply to an affirmative defense. If replies to affirmative defenses are allowed, it follows that the Commission should be able to determine the role and format of those replies. As the Public Representative acknowledges, the Federal Rules of Civil Procedure provide that an allegation "is admitted if a responsive pleading is required and the allegation is not denied."[51] This rule streamlines the pleading process in a manner that is clearly established and equally applied to all participants. It makes sense that the same rule would apply to a reply to an affirmative defense in the limited circumstances where replies to answers are allowed. Otherwise, a party may file a complaint anticipating that it could effectively ignore any valid affirmative defenses raised by the Postal Service through the pleadings process. It also means that cases that should not be litigated because of the existence of a strong affirmative defense will have to proceed past the pleadings stage.

The Public Representative's attempt to distinguish Commission proceedings from federal judicial proceedings is not compelling. The Public Representative asserts that "the nature of administrative proceedings differs from adversarial proceedings in that the

[49] Public Representative Comments at 19. *See also* Order No. 1739 at 34.

[50] Order No. 1739 at 21.

[51] FED. R. CIV. P. 8(b)(6); *see also* Public Representative Comments at 19 n.14.

rights of parties not before the Commission in the proceedings are at stake."[52] However, the outcomes of federal antitrust cases often have an impact on an entire market, not just on the litigants.

If the Commission establishes accelerated procedures for complaint cases, it must account for consideration of affirmative defenses. Allowing for replies to answers is one way to address such affirmative defenses. A rule that allows for replies but does not deem as admitted any unanswered affirmative defenses, would result in insufficient consideration of the affirmative defenses in an accelerated docket and would result in unnecessary litigation.

H. When a Complainant Opts for Accelerated Procedures for a Section 404a Complaint, the Commission Should Not Allow Claims Related to the Section 404a Complaint to Be Held in Abeyance.

Stamps.com and Endicia assert that when a complainant opts for the accelerated procedures for a section 404a complaint, "related claims should be held in abeyance" rather than deemed waived, as indicated by proposed rule 3033.1.[53] The position taken by Stamps.com and Endicia is inconsistent with the doctrines of claim preclusion (*res judicata*) and collateral estoppel, and it would have the unfair and inefficient result of forcing the Postal Service to litigate multiple cases arising from the same set of facts.

As the Commission explained in Order No. 1739, proposed rule 3033.1 "eliminates the possibility of requiring the Postal Service to litigate two complaints (one accelerated and one non-accelerated) arising out of the same set of facts" and the proposed rule "avoids the potential unfairness that would result if the Postal Service had to effectively divulge its litigation strategy at an early stage of a non-accelerated

[52] Public Representative Comments at 19 n.14.

[53] Stamps.com and Endicia Comments at 7-8; Order No. 1739 at 18 n.12, 29.

complaint through its filings in a related accelerated proceeding."[54] Moreover, allowing the complainant to hold non-section 404a claims arising from the same set of facts in abeyance would result in a number of undesirable results that are easily avoided when applying the well-established doctrines of claim preclusion and collateral estoppel. These undesirable results include unfairly providing the complainant the ability to litigate the same facts twice, wasting resources by re-litigating issues already considered by the Commission, and creating the potential for inconsistent decisions.[55]

Stamps.com and Endicia recognize that the Commission's fairness concerns are appropriate, but somehow believe that they are outweighed by the potential "harsh" result of complainants losing the ability to raise related claims if they opt for the accelerated procedures.[56] The fact that the complainant is in the position to choose between ordinary or accelerated procedures should assuage this concern.[57] The negative impact on the Postal Service has the potential to be much worse because the Postal Service has no choice in the format of the proceedings.[58] If a complainant is

[54] Order No. 1739 at 18; *see also Montana v. United States*, 440 U.S. 147, 153 (1979) *("*Application of both [res judicata and collateral estoppel] is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions.").

[55] *Montana*, 440 U.S. at 153-54 ("To preclude parties from contesting matters they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.").

[56] Stamps.com and Endicia Comments at 7-8.

[57] *See, e.g.*, *Kale v. Combined Ins. Co. of Am.*, 924 F.2d 1161, 1168 (1st Cir. 1991) (holding that an appellant's decision to pursue some claims in a federal court action and other related claims in a subsequent state court action "was voluntary" noting that the appellant was aware that "he had a full and fair opportunity to litigate all of his claims [in the first action] but declined to avail himself of it"); *see also Smith v. Horner*, 846 F.2d 1521, 1524 n.3 (D.C. Cir. 1988) ("Claim preclusion does not turn on whether the first court chosen has jurisdiction as expansive as the later one. All that matters in that plaintiff had an opportunity to litigate both claims in a court of competent jurisdiction . . . but instead chose to split them.") (internal citations omitted).

[58] *See, e.g.*, USPS Initial Comments at 7-8 (explaining that the Postal Service opposes the Commission's proposal to allow complainants to choose the accelerated procedures without consent of the Postal Service or other participants).

concerned about litigating related claims, then it can file a complaint using the ordinary procedures.

Stamps.com and Endicia also assert that the lack of discovery under accelerated procedures could cause a complainant to be unable to meet its burden of proof for section 404a claims, or for related claims, in an accelerated proceeding.[59] This concern proves the point. Discovery is limited in the accelerated proceedings to facilitate expedited consideration of the claim. If a section 404a claim or a related claim requires discovery, then it is not appropriate for the proposed accelerated procedures and a complainant should opt for consideration under the ordinary procedures.

II. THE INTERPRETATION OF SECTION 404a TO PROHIBIT HARM MERELY TO A COMPETITOR, BUT NOT TO COMPETITION ITSELF, CONFLICTS WITH THE STATUTE AND WOULD ENABLE THE USE OF SECTION 404a TO RESTRICT COMPETITION AND HARM CONSUMERS.

The conduct prohibited by section 404a(a)(1) concerns the "preclu[sion of] competition or establish[ment of] the terms of competition." It does not address conduct that might affect competitors more generally. Despite the focus of section 404a(a)(1)'s language on competition and the absence of any reference to "competitors" as such, multiple parties encourage the Commission to apply and interpret section 404a(a)(1) as a protection for competitors.[60] Not only does the interpretation proposed by these parties conflict with the language of the statute, but, as described in more detail below, this interpretation could produce an environment harmful to consumers. Time supports the Postal Service's position on this matter.[61]

[59] Stamps.com and Indicia Comments at 8.

[60] Public Representative Comments at 8-9; UPS Initial Comments at 5-9.

[61] Time Comments at 4, 15.

The Public Representative contends that section 404a should protect against harm to competitors.[62] Similarly, UPS asserts that antitrust and unfair competition principles are not incorporated into 39 U.S.C. § 404a, and that section 404a serves a different purpose: protection of competitors.[63] In contrast, as described below, Time explains that section 404a is intended to address concerns about harm to competition, while other statutes address concerns about harm to a competitor.[64]

At its core, antitrust law aims to protect competition, rather than individual competitors.[65] A competitor cannot use antitrust laws to protect itself from competition.[66] This distinction reflects the recognition that competition leads to innovation, efficiency, and consumer benefits.[67] The focus on harm to competition, and exclusion of considerations regarding harm to a competitor, aims to "make[] certain that [antitrust litigants] will not be able to recover under the antitrust laws when the action challenged would tend to promote competition."[68]

An interpretation of section 404a(a)(1) as protecting competitors is not necessary because section 403(c) expressly protects competitors. Section 403(c) provides a party with a basis for challenging discriminatory treatment among competing mailers that results in a competitive disadvantage to the complaining party. As recognized by Time,

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[62] PR Comments at 8-9.

[63] UPS Comments at 5-9.

[64] Time Comments at 15.

[65] *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

[66] *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450-451 (6th Cir. 2007) ("[O]ne competitor may not use the antitrust laws to sue a rival merely for vigorous or intensified competition").

[67] *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 21-22 (1st Cir. 1990) (recognizing "competition's basic goals-lower prices, better products, and more efficient production methods").

[68] *HyPoint Tech., Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 877 (6th Cir. 1991).

there is a clear "distinction between (a) unfair competition based on misuse of the Postal Service's legal monopoly and its statutory regulatory authority, resulting in harm to competition or the marketplace, in violation of § 404a, and (b) undue discrimination against a user of the mails, who may also happen to be a competitor of the Postal Service in the same or another market, in violation § 403(c)."[69] Commenters' proposed interpretation of section 404a(a)(1) would muddle this distinction. Section 403(c) does not limit the scope of the conduct that may be challenged to a "rule, regulation, or standard," and, thus, it offers an alternative option for challenging conduct that raises unfair competition issues.

Finally, the Public Representative's statement that "[t]he balance that courts need to strike between promoting competition while preventing the destruction of competition is not present when the Commission examines the Postal Service's regulations"[70] reflects an incomplete understanding of the scope of conduct subject to section 404a(a)(1). For example, some firms that could bring a complaint under section 404a enjoy scant competition, serve only profitable market segments, or price their products in a way that makes their services inaccessible to certain market segments. Postal Service rules, regulations, or standards that encourage entry of competitors in these markets would increase options for consumers, and pressure existing private competitors to operate more efficiently. The use of section 404a to prohibit increased competition in these markets would protect existing private competitors' position in the market, and in some cases their ability to price above the competitive market rate,

[69] Time Comments at 15.

[70] Public Representative Comments at 9.

discourage innovation and efficiency by these participants, and restrict the ability of certain customer segments to obtain valuable mail-oriented services.

III. ALTHOUGH SECTION 404a REFLECTS SOME PRINCIPLES OF ANTITRUST LAW, IT DOES NOT INCORPORATE THE FULL SET OF FEDERAL ANTITRUST LAWS.

Notwithstanding the Public Representative's endorsement of the application of section 404a(a)(1) to protect competitors rather than competition in conflict with antitrust law, the Public Representative seeks elsewhere in his comments to incorporate the full set of antitrust laws into section 404a.[71] For example, the Public Representative proposes adoption of a balancing test similar to ones used in antitrust law.[72] Under this balancing test, "[t]o show that a regulation is not unfair, the Postal Service should be required to show that the disputed regulation serves some legitimate regulatory purpose."[73] The complainant would then have the opportunity to rebut the Postal Service's showing by demonstrating that the competitive harm outweighs the regulatory benefit, or that "the regulatory benefit could be accomplished through means that cause substantially less harm to competition."[74] As described below, Congress did not intend to apply the full set of federal antitrust laws to all actions of the Postal Service, and the incorporation of the Public Representative's proposal regarding federal antitrust law's role in section 404a would expand the scope of Postal Service conduct subject to the antitrust laws, well beyond Congressional intent.

[71] Public Representative Comments at 6-8.

Congress has enumerated specific circumstances where the federal antitrust laws apply to the Postal Service.[75] Outside of those circumstances, the Postal Service is not a "person" for purposes of antitrust laws.[76] The narrow application of the antitrust laws to the Postal Service was reinforced recently in a case decided by a federal district court.[77] In *TOG v. United States Postal Service*, the Court recognized that application of the federal antitrust laws to the Postal Service is limited to "products," and that the antitrust laws do not apply to conduct in general or to products covered by the Private Express Statutes as described in 18 U.S.C. § 1696.[78] In rejecting an antitrust challenge to Postal Service requirements regarding use of postage labeling systems and related materials in Contract Postal Units, the Court ruled that the Postal Service was immune from antitrust liability because the challenged conduct did not meet the "product" requirement or because, even if it did pertain to a "product," that product was reserved to the Postal Service by statute.[79]

Accordingly, the Commission cannot and should not accept the Public Representative's invitation to expand the scope of the Postal Service's antitrust liability beyond the limits that Congress has set for it.

[75] 39 U.S.C. § 409(e)(1) (applying the antitrust laws to activities by, on behalf of, or in concert with the Postal Service with respect to "any product which is not reserved to the United States" under the Private Express Statutes).

[76] *United States Postal Serv. v. Flamingo Indus. Ltd*., 540 U.S. 736, 746-747 (2004).

[77] *See TOG, Inc. v. United States Postal Serv.*, No. 12-cv-01946-JLK, 2013 WL 3353883 (D. Colo. July 3, 2013) (analyzing definition of "product" and postal monopoly for purposes of antitrust laws).

[78] *Id.*

[79] *Id.*

IV. THE DEFINITION OF RULE, REGULATION, OR STANDARD SHOULD NOT BE EXPANDED BEYOND THE DEFINITION IN 39 C.F.R. § 211.2.

Pitney Bowes, Stamps.com and Endicia, and UPS agree with the Commission's proposal to expand the term "rule, regulation, or standard" to include "among other things, documents or policies issued by the Postal Service to exercise its regulatory authority or otherwise act as a governmental entity."[80] The Public Representative supports an even broader interpretation.[81] For the reasons explained in the Postal Service's Initial Comments, however, the positions taken by these parties are too broad and inconsistent with the definition of "regulation" provided in 39 C.F.R. § 211.2.

Pitney Bowes, Stamps.com and Endicia, and UPS are concerned that the Postal Service can label an action as something other than a rule or regulation to evade section 404a under the current rules.[82] The Postal Service's definition of "regulations of the United States Postal Service" in 39 C.F.R. § 211.2 is clear and broad enough to address this concern, however. The definition includes a wide array of Postal Service documentation, such as resolutions of the Governors and the Board of Governors and the bylaws of the Board of Governors, Postal Service manuals such as the Domestic Mail Manual and Postal Operations Manual, and a number of other forms of documentation, including "Headquarters Circulars, Management Instructions, handbooks, delegations of authority, and other regulatory issuances and directives of

[80] Pitney Bowes Comments at 6 (supporting "a broad application of the phrase 'rule or regulation (including any standard)'"; Stamps.com and Endicia Comments at 3-5 (agreeing with the Commission that a "broad definition of 'standards' is required to ensure that form is not elevated over substance"); UPS Initial Comments at 4; *see also* Order No. 1739 at 26.

[81] Public Representative Comments at 10.

[82] Pitney Bowes Comments at 6; Stamps.com and Endicia Comments at 4-5; UPS Initial Comments at 4. Stamps.com and Endicia assert that the USPS replaced its Purchasing Manual with an Interim Internal Purchasing Guidebook in a manner that would avoid section 404a jurisdiction. Stamps.com and Endicia Comments at 4. However, the regulations in 39 C.F.R. § 601 ensure that the Postal Service is not putting form over substance in the procurement area.

the Postal Service" (all of which "may be published in the *Federal Register* and the Code of Federal Regulations").[83] The breadth of documentation covered by "rule, regulation or standard," when applying the already used definition of "regulation," ensures that the Postal Service cannot strategically define actions to avoid complaint jurisdiction.[84]

In addition to being inconsistent with current Postal Service regulations, the Commission's proposed definition of "rule, regulation, or standard" is overly broad and vague. In contrast, the Postal Service's definition of "rule, regulation or standard," incorporating the definition of "regulation" provided in 39 C.F.R. § 211.2, provides specific guidance to potential litigants of the scope of the term. Even when agreeing with the Commission's broad interpretation, Stamps.com and Endicia recognize the need to enumerate the specific actions that would qualify as a "standard" to avoid "needless disputes on whether complaints based on such actions are properly before the Commission."[85]

Going even further than a broad interpretation of "rule, regulation, or standard," the Public Representative asserts that "[f]or the Commission's regulations to be as effective as possible, they should also permit a complaint to be brought if the Postal Service engages in a 'dormant' violation of section 404a(a)(1) by entering into competition in a market that it currently regulates."[86] Other participants proffer similar

[83] 39 C.F.R. § 211.2; *see also* USPS Initial Comments at 6 n.9.

[84] Nor can the Postal Service do so stealthily. If the Postal Service were to amend the definition of its "regulations" in 39 C.F.R. § 211.2, it would have to publish a *Federal Register* notice thereof.

[85] Stamps.com and Endicia Comments at 4 (listing specific terms to "include within the ambit of 'standard'").

[86] Public Representative Comments at 10. The Public Representative asserts that proposed rule 3032.5 should be amended to allow complaints "in instances in which the Postal Service's entry into a competitive market has the effect of precluding or establishing the terms of competition." *Id.*

concerns regarding general Postal Service market activity and specific Postal Service products.[87] The Public Representative and other parties' concerns go well beyond the scope of the statute which, as the Commission explains, applies to instances where the "Postal Service exercis[es] its regulatory authority or otherwise act[s] as a governmental entity, as opposed to acting solely as a competitor or market participant."[88] Mere entrance into a market is clearly insufficient – per the language of the statute – to trigger section 404a jurisdiction as the statute requires the Postal Service to take a regulatory action by "establish[ing] a rule or regulation."[89] Section 404a is intended to limit the Postal Service's regulatory power and actions taken as a governmental entity, not its non-regulatory activity within a market. Other existing laws and regulations offer an effective framework for addressing participants' concerns about market foreclosure and specific Postal Service initiatives.[90] Moreover, when the Postal Service does offer a product or enter a particular market, it is likely to increase competition by providing another option to consumers. As such, regardless of the Commission's ultimate determination regarding the interpretation of "rule, regulation or standard," the Public Representative's position to expand section 404a complaint jurisdiction should be rejected.

[87] GrayHair Comments at 3-10 (describing concerns regarding competitive foreclosure by the Postal Service); IDEAlliance Initial Comments at 2 (expressing concerns about specific Postal Service products and initiatives); Comments of the National Association of Presort Mailers, PRC Docket No. RM2013-4 (July 29, 2013), at 2-4 (expressing concerns about "new service offerings that directly compete with offerings from mail service providers").

[88] Order No. 1739 at 15 (explaining that "Congress intended for section 404a(a)(1) to, in part, place a check on the Postal Service and keep it from using its authority as a regulator or governmental entity to harm the marketplace"); *see also* Time Comments at 13-15 (expressing concern regarding the jurisdictional scope of section 404a).

[89] 39 U.S.C. § 404a(1).

[90] *See* 39 U.S.C. § 403(c).

V. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ISSUE PRELIMINARY INJUNCTIVE RELIEF.

The Public Representative proposes that the Commission draft rules establishing the Commission's authority to order preliminary injunctive relief[91] in order to address claims of ongoing damages.[92] Such a recommendation is beyond the scope of the Commission's statutory authority. Congress determines the Commission's jurisdiction to hear complaint cases and the remedies available in those actions, and Congress has not authorized the Commission to issue preliminary injunctive relief. Rather, the plain language of section 3662(c), which establishes complaint jurisdiction for section 404a claims, limits the Commission's remedial authority to relief that is predicated on a finding of "noncompliance" by the Postal Service with the law, rather than relief predicated on the standards for the issuance of a preliminary injunction. .

Although all powers possessed by an agency require conferral from Congress, there must be a particularly clear intent with respect to the power to issue preliminary injunctive relief.[93] Sections 404a and 3662 do not contain any reference to preliminary injunctive relief. Rather, the plain language of section 3662, standing alone and considered in the context of the statute as a whole, as well as the legislative history, clearly demonstrates that Congress did not grant the Commission the authority to issue

[91] The Public Representative's proposal suggests the Commission establish injunctive relief, but the reference to the Federal Rules of Civil Procedure and supporting case both address preliminary injunctions. Postal Service counsel spoke with the Public Representative, who clarified his comments and verified that he is proposing that the Commission draft rules establishing preliminary injunctive relief during the pendency of a section 404a case. The Postal Service and Commission have long recognized the Commission's ability to issue injunctive relief after a full hearing on the record pursuant to section 3662(c); however, no such recognition exists for preliminary injunctive relief.

[92] Public Representative Comments at 12 n.10.

[93] *See Trans-Pac. Freight Conf. of Japan v. Fed. Mar. Bd.*, 302 F.2d 875, 880 (D.C. Cir. 1962). ("We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency [in the absence of express authority].").

preliminary relief. Without such a grant from Congress, the Commission cannot issue rules establishing the relief proposed by the Public Representative.

Section 404a, which prohibits unfair competition by the Postal Service, provides a means to file a complaint case with the Commission. In filing such a complaint, section 404a requires that the Commission utilize the standards and requirements of section 3662 when establishing its rules and crafting any remedy.[94] The plain language of section 3662 demonstrates the Commission's lack of authority to issue emergency injunctive relief. The remedial authority afforded to the Commission by section 3662(c) does not extend to preliminary relief, but is explicitly conditioned on the Commission determining that the Postal Service has not complied with the law.[95] Indeed, section 3662(c) is titled "Action required if complaint found to be justified" and describes the Commission's remedial authority in complaint proceedings as being to order the Postal Service to "achieve compliance" with the law, and to remedy the "effects" of Postal Service "noncompliance." The examples provided as part of section 3662(c) as means by which the Commission can remedy the "effects of any noncompliance" similarly demonstrate that the Commission can only act after finding that the Postal Service has violated the law. The acts of "adjusting," "cancelling," "discontinuing," and "making up for" are not acts of a preliminary nature.[96]

[94] *See* 39 U.S.C. § 404a(c).

[95] Section 3622(c) states, "*If the Postal Regulatory Commission finds the complaint to be justified*, it shall order that the Postal Service take such actions as the Commission considers appropriate in order to *achieve compliance* with the applicable requirements and to remedy the effects of *any noncompliance* (such as ordering unlawful rates to be adjusted to lawful levels, ordering the cancellation of market tests, ordering the Postal Service to discontinue providing loss-making products, or requiring the Postal Service to make up for revenue shortfalls in competitive products)" (emphasis added).

[96] 39 U.S.C. § 3662(c).

Accordingly, based on its plain language, section 3662(c) does not grant the Commission the authority to issue preliminary relief.[97] This interpretation is reinforced when considering the statute as a whole, which indicates that when Congress grants the Commission the power to enact preliminary relief, it does so expressly.[98] The plain language is also reinforced by the legislative history of section 3662, which demonstrates that Congress considered giving the Commission preliminary injunctive authority in the context of certain complaint cases, but decided not to do so.[99]

Courts have rejected similar attempts by other regulatory agencies to draft rules for or impose preliminary injunctive relief when implementing complaint authority similar to that of the Commission.[100] For example, in *Trans-Pacific Freight Conference of Japan v. Federal Maritime Board*, the Federal Maritime Board (FMB) was barred from issuing interim relief where its only remedial authority was conditioned upon a finding of a legal violation.[101] Like the FMB, the Commission's remedial authority under its complaint procedures is conditional on a finding of a legal violation. Also like the FMB,

[97] In fact, an earlier version of the Postal Accountability and Enhancement Act of 2006 (PAEA) would have given the Commission the power to suspend competitive negotiated service agreements pending the outcome of a complaint proceeding, based on factors substantially identical to the standards for issuing an injunction. *See* H.R. 22, 109th Cong., § 205 (2005) (as passed by House). Even this limited authority was not included in the final version of the PAEA. This suggests that Congress considered, but rejected, giving the Commission injunctive authority under section 3662.

[98] Section 404(d)(5) provides the Commission with the authority "to suspend the effectiveness of the determination of the Postal Service [to close or consolidate a post office] until the final disposition of the appeal." The comparison of these two sections demonstrates that Congress delegates authority for preliminary relief expressly where it intends for the Commission to possess such authority.

[99] An earlier version of the Postal Accountability and Enhancement Act of 2006 (PAEA) would have given the Commission the power to suspend competitive negotiated service agreements pending the outcome of a complaint proceeding, based on factors substantially identical to the standards for issuing an injunction. *See* H.R. 22, 109th Cong., § 205 (2005) (as passed by House). Even this limited authority was not included in the final version of the PAEA. This suggests that Congress considered, but rejected, giving the Commission injunctive authority under section 3662.

[100] *See, e.g.*, *Trans-Pac. Freight Conf.*, 302 F.2d at 878-80 (reversing order of Federal Maritime Board that imposed preliminary injunctive relief in the form of cease and desist order, where FMB's remedial authority was conditioned upon finding a violation of the Shipping Act, and no violation was found).

[101] *Id*.

the Commission cannot make that finding until it has fully heard and considered the evidence. Therefore, the Commission, like the FMB in *Trans-Pacific Freight Conference*, does not have the statutory authority to issue preliminary injunctive relief pending the resolution of a complaint.

The Commission's previous suggestion in another docket that it "may have" preliminary injunctive authority because of section 503 is also not accurate. The fact that the Federal Communications Commission (FCC) has preliminary injunctive authority in adjudicating certain proceedings under the Communications Act does not mean that the Commission necessarily has comparable authority when hearing a complaint under section 3662 (even assuming, for the sake of argument, that the Commission's authority under section 503 is equivalent to the FCC's ancillary authority under 47 U.S.C. § 154(i)). The exercise of authority by an agency under an ancillary authority provision must be in support of, and therefore be consistent with, authority that has been expressly conferred elsewhere in the statute.[102] Thus, it is necessary to examine whether the actions taken by an agency pursuant to its ancillary authority is consistent with the specific statutory scheme under which the agency operates.[103]

As discussed above, it is clear that section 3662 does not allow the Commission to issue preliminary relief. The Commission cannot use the general "ancillary" provision

[102] *See, e.g.*, *Comcast Corp. v. FCC*, 600 F.3d 642, 651-61 (D.C. Cir. 2010) (noting the "derivative nature" of ancillary authority, which must have "sufficient grounding in express statutory authority"); *New England Power Co. v. Fed. Power Comm'n,* 467 F.2d 425, 430-31 (D.C. Cir. 1972) (noting that the ancillary authority provisions are "of an implementary rather than substantive character").

[103] *See, e.g.*, *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 998-1000 (D.C. Cir. 2013) (rejecting FCC attempt to assert its ancillary authority by finding that the exercise of such authority was inconsistent with the specific provisions the agency was purporting to support); *Pub. Serv. Comm'n v. FERC*, 866 F.2d 487, 491-92 (D.C. Cir. 1989) (noting that the ancillary authority provision of the Natural Gas Act did not give FERC the authority to contravene the structure of the Act); *Am. Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 875-78 (2nd Cir. 1973) (rejecting FCC use of ancillary authority by finding that it would circumvent the language of the statute).

of section 503 to assert an authority in conducting complaint proceedings that is denied to it by section 3662. The Supreme Court decision cited by the Commission is inapposite, because the FCC's decision to issue preliminary injunctive relief in that instance in no way conflicted with the language of the Communications Act.[104]

The legislative history further demonstrates that it is inappropriate to read section 503 as a means of aggressively interpreting the Commission's authority when hearing a complaint under section 3662. Earlier versions of the PAEA would have given the Commission much broader complaint authority than was enacted, as it would have extended the scope of section 3662 to a broader array of Postal Service activities (by giving the Commission the authority to determine Postal Service compliance with the entirety of chapters 1, 4, and 6, rather than the specified provisions of those chapters ultimately incorporated), and would have given the Commission the authority to issue preliminary relief concerning competitive negotiated service agreements.[105] The fact that the language of section 3662 was substantially narrowed prior to enactment demonstrates not only that Congress considered, but rejected, giving the Commission the authority to issue a preliminary injunction, but also that the language of Section 3662 was carefully crafted so as to not unduly expand the Commission's authority over the Postal Service. This fact underscores that precedent finding that another agency (whose authority over a regulated industry is often more plenary than the Commission's

[104] *Am. Tel. & Tel. Co*, 487 F.2d at 875 (rejecting FCC claim that *Southwestern Cable* authorized it to issue order by noting that, "[i]n upholding the Commission's order in *Southwestern,* the Court did not condone circumvention of statutorily prescribed procedures with consequent frustration of the statutory purpose"). Furthermore, the FCC order cited by the Commission is also inapposite. Even assuming the validity of that order as to the general issue of preliminary relief, the complaint rules put in place by that order concerned a complaint provision that, far from limiting the remedies available to the FCC in a manner similar to section 3662, broadly authorized the FCC to issue remedies. 47 U.S.C. § 548(e).

[105] *See* H.R. 22, 109th Cong., § 205 (2005) (as passed by House).

authority over the Postal Service) acted appropriately under its respective ancillary authority provision must be treated with caution in interpreting the Commission's authority under Section 503.

Accordingly, the Public Representative's recommendation to create a preliminary injunctive relief procedure for section 404a claims lacks any statutory authority, and the Commission cannot adopt it. [106]

VI. THE REQUIREMENT OF PROPOSED RULE 3032.7(a)(1) REGARDING THE PROVISION OF A PRODUCT TO THE POSTAL SERVICE IS ESSENTIAL TO THE PROPOSED RULE.

Section 404a(a)(3) aims to restrict the Postal Service's use of information obtained from another party, and excludes use of information where "substantially the same information is obtained (or obtainable) from an independent source or is otherwise obtained (or obtainable)." Proposed rule 3032.7(a)(1) provides that "[a] complaint alleging a violation of 39 U.S.C. § 404a(a)(3) must show that [t]he person filing the complaint has provided or sought to provide a product to the Postal Service." Stamps.com and Endicia propose that the clause "to the Postal Service" be removed from proposed rule 3032.7(a)(1).[107]

The Postal Service opposes Stamps.com and Endicia's proposal. Section 404a(a)(3) aims to protect confidential information shared with the Postal Service pursuant to a business relationship.[108] Where the Postal Service obtains information about a party's product outside of discussions associated with a party's attempt to

[106] In any event, the Commission is not compelled to decide the issue of its authority now, even if it decides to go forward with separate rules for Section 404a complaints. The lack of specific rules governing preliminary relief would not stop a party from seeking such relief, just as it did not stop the American Postal Workers Union (APWU) from seeking injunctive relief under the Commission's normal complaint procedures in Docket No. C2012-2.

[107] Stamps.com and Endicia Comments at 5-6.

[108] *See* Order No. 1739 at 16-17.

provide that product to the Postal Service, disclosure of information is unlikely to implicate the purposes of section 404a(a)(3). It is not apparent why a party would determine it necessary to disclose confidential information in this context, and it is unlikely that the information would actually be confidential or otherwise unobtainable. To the extent that a party plans to disclose confidential information about its product to the Postal Service without seeking to provide that product to the Postal Service, it can avail itself of other options for protecting its interests, including use of a nondisclosure agreement.

VII. PITNEY BOWES' COMMENTS REGARDING WORKSHARE DISCOUNTS ARE NOT APPROPRIATE FOR CONSIDERATION IN THIS DOCKET.

The Comments of Pitney Bowes examine at length issues related to workshare discounts. This discussion is beyond the scope of this docket, and should not be considered at this time. Specifically, Pitney Bowes suggests that "[the Commission] should use its expanded regulatory authority to carefully scrutinize discounts set below avoided costs [and] should also revisit, pursuant to its authority under section 3622(a) and (d)(3), the system for regulating rates to require that workshare discounts be set (wherever practicable) at 100 percent of avoided costs."[109] These suggestions, and the topic as a whole, are not related to this specific rulemaking docket, which was established to discuss the procedures governing complaints brought under section 404a. The complaints that Pitney Bowes discusses would not fall within these expedited procedures, nor would they be brought under section 404a at all. As such, discussion of this issue is inappropriate for this docket. Should the Commission which to pursue these complaints, a separate docket should be created to discuss these

[109] Pitney Bowes Comments at 9.

matters in full.

Conclusion

The Postal Service respectfully submits these Reply Comments to address the Initial Comments that other parties have filed in this docket. The Postal Service again urges the Commission to withdraw its proposed rules for section 404a complaints, and instead to aim to administer complaints alleging violations under section 404a under its existing Rules of Practice implementing section 3662. The Commission can already expedite complaint proceedings under its current rules when necessary and appropriate, with the mutual consent of all affected parties.

Respectfully submitted,

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